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IN THE
Supreme Court of the United States

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No.

G. T. FOGLE & COMPANY, A CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition of G. T. Fogle & Company, a Corporation, for a Writ of Certiorari to Review a Judgment Entered April 20th, 1943, by the United States Circuit Court of Appeals for the Fourth Circuit, Affirming the Judgment of the District Court of the United States for the Southern District of West Virginia, at Charleston, Against Petitioner, Entered on July 18th, 1942; a Petition for Rehearing of which said Judgment of April 20th, 1943, filed June 8th, 1943, was Refused by said Circuit Court of Appeals on June 16th, 1943; and Brief in Support Thereof.

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Of Counsel.



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OPINIONS BELOW.

The District Court of the United States for the Southern District of West Virginia, filed an opinion, found in the transcript of the record at page 3; and the opinion of the appellate court has been printed, is found is found in the transcript of the record (R. 30), and is

reported at page 117 of the advance sheets of 135 Fed. 2d, dated June 14th, 1943.

JURISDICTION.

The jurisdiction of this court for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fourth Circuit of April 20th, 1943, and the refusal to petitioner, on June, 16th, 1943, of a rehearing of said judgment, is invoked under Section 240 of the Judicial Code, as amended (28 U. S. C. 347, Sec. 4).

STATEMENT OF THE CASE.

(For brevity and convenience, G. T. Fogle & Company, appellant and petitioner, will be hereinafter designated "the plaintiff"; the United States of America, appellee and respondent, as "the defendant" or "the Government"; the District Court as "the trial court"; the Circuit Court of Appeals as "the appellate court"; and the United States Supreme Court as "this court".)

This is a suit instituted under the Tucker Act by G. T. Fogle & Company, a West Virginia corporation, against the United States of America for the recovery of damages for breach by the latter of three separate contracts, made between the Procurement Division of the United States Treasury Department, at Charleston, West Virginia, for the rental of street and road construction equipment to be used by the Works Progress Administration of West Virginia upon the several construction projects to which they were delivered. The three contracts were, respectively, for the rental of a concrete

mixer, a gasoline shovel, and another concrete mixer. Each of these contracts was executed on United States Standard Form No. 33 (Revised); and to this form, the contractual part of which was typewritten, there was attached and made a part of Contract No. 1, for the first concrete mixer, and Contract No. 2, for the rental of the shovel, a printed form designated "Form S. P. O. No. 7, Standard Conditions of Equipment Rental". See transcript of record, Appendix to Brief, p. 7. This printed form was not attached to Contract No. 3, for the second mixer rented, but as it provides that it "shall be attached" to form No. 33, it was treated by plaintiff as being a part of the third contract as a matter of law, and the omission to so attach it by recital as an oversight or inadvertence on the part of the contracting officer of the Government. Photostatic copies of the three contracts are found in the unprinted record as Government exhibits, marked, respectively, Exhibit 2-1 to 2-3, Exhibit 3-1 to 3-2, and Exhibit 1-1 to 1-3. Plaintiff bid upon all three contracts at the invitation of the Government, mailed to a list of equipment owners selected by it, for sealed bids for the services of the designated equipment, and was awarded each of them as the lowest bidder thereon.

Contract No. 1—Concrete Mixer.

This contract, awarded to plaintiff September 17th, 1935, was for the rental of a one bag concrete mixer for 100 hours at seventy-five cents per hour. The mixer was delivered upon the project at West Hamlin, Lincoln County, approximately fifty miles from plaintiff's plant site at St. Albans, West Virginia, on September 23rd, 1935. Before it left the plant site it had been

equipped with a new magneto, fueled and operated by plaintiff's superintendent, and determined to be in first class working condition. On delivery it was receipted for as being in good working condition by the foreman on the project. The transportation cost from St. Albans to West Hamlin was \$9.18. After waiting two months without receiving any rental for it, plaintiff wrote to J. R. Downey, the Procurement Division officer who signed the contract for the Government, regarding it, and a month later, at the latter's suggestion, wrote to the WPA district engineer at Huntington, in charge of the West Hamlin project, on the subject. More than four months after its delivery there, plaintiff received a letter, dated January 29th, 1936, from D. W. Harris, acting supervisor of the Fifth District WPA, which letter was the first information of any character received by it in the matter, stating that he had been advised by the engineering department "that they have been unable to use the mixer * * * due to adverse weather conditions", and "that this piece of equipment will not be needed for about sixty days", and offering to permit plaintiff to remove the mixer, and to compensate it for the cost of transporting the same. See Claim No. 1, Exhibit E, with Petition to WPA, Government's Exhibit, Photostat, unprinted record, p. 27. The weather conditions for concrete construction from September 23rd, 1935, to at least December 10th, 1935, were not only not "adverse", but were almost ideal. Upon receipt of this letter plaintiff promptly investigated the matter, and found that the mixer had never been needed on the project, had been requisitioned in error in the first instance, and consequently had never been actually used, and it so wrote officials of the Fifth District WPA. Plaintiff next received a letter from J. M. Oliver, requisitioning engineer at Huntington, offering to pay \$65.00

in satisfaction of its claim under the rental contract, that being the amount tentatively allocated for mixer rental in the preliminary engineering estimate of the cost of the project. See Claim No. 1, Exhibit F, Pet. WPA, Government Exhibit, unprinted Record, p. 28. The office of the state WPA administrator at Charleston then advised plaintiff that the Huntington office could recommend payment to it, first, of \$75.00 under the contract for 100 hours at seventy-five cents per hour, and, second, under an extension of the contract for a month under Paragraph 6 of Form S. P. O. No. 7, pay for this extension, on the basis of 112 hours, the minimum number of hours per month such equipment was then being operated by WPA, at seventy-five cents per hour, an additional \$84.00, making a total payment under the contract of \$159.00; and that if settlement on this basis was recommended by the Huntington office it would be approved, and payment made, by the Charleston office. Plaintiff transmitted this information to the Huntington office, and offered to settle its claim for \$159.00, but refused to settle it for \$65.00. In reply the Huntington office made a counter offer of settlement for \$130.00, "even though the mixer has not been in operation since delivery to the job". See Claim No. 1, Exhibit H, Pet. to WPA, Government Exhibit H, Photostat, unprinted Record, p. 34. Plaintiff refused to accept this offer, negotiations with the Huntington office for settlement ceased, and plaintiff filed its petition to the state administrator of WPA, presenting its claim for damages from the breach of the contract by the Government, embodying in the one petition its claims for damages for the breach of contracts No. 2 and No. 3, accrued to it in the meantime. Plaintiff took as the measure of its damages for the failure of the Govern-

ment to use the mixer, its fair monthly rental value of \$75.00, the rental being paid by WPA for a like mixer, for the four months it was held at West Hamlin and not used, a total damage of \$300.00. The state administrator referred plaintiff's claim under all three contracts, and a fourth claim for the value of certain water pipe which the WPA had appropriated, used, and failed to return to plaintiff, to the Procurement Division, as having executed the contracts for the Government. A factual controversy having arisen as to whether this pipe had been returned to plaintiff (the only disputed question of fact arising between plaintiff and the Government, all matters of fact regarding the three written contracts being admitted by the Government), the deputy administrator of WPA, by letter, directed the Procurement Division, as plaintiff's counsel construed such direction, to submit the question of payment for the pipe, only, to the General Accounting Office of the Treasury Department. See letter E. C. Smith, with Government's Answer, marked X-61, unprinted Record, p. The procurement officer interpreted this letter as a direction to refer, and did refer, the three equipment contracts, as well as the pipe claim, to that office. In his letter to it Mr. Downey, chief purchase officer, who executed the mixer contract for the Government, said, pertaining to the mixer claim of \$300.00:

"The claimant avers that the equipment was held by the Works Progress Administration for a period of four months, and the claim is based on damages sustained by the fact that the equipment was held and not used, thus causing a loss of income that might have accrued should the equipment have been either used by the Works Progress Administration or surrendered to the possession of the claimant. * * *

"The statements made by the claimant that the equipment was held by Works Progress Administration for the period stated are confirmed. ° ° °"

"It is noted that the Deputy State Administrator ° ° ° recommends payment on this claim of \$75.00.

"Encumbrance for the amount of \$300.00 has been provided on this subject. ° ° °"

"There is no question in the mind of the Procurement Officer but that *the contractor was damaged financially by reason of the Government failing to complete the three contracts covered by the first three claims.* ° ° °"

(See Downey Letter, R. 11, 14; Exhibits, Photostats, X-13 to X-16, inc., with Government's Answer, unprinted Record, pp.

Contract No. 2—Gasoline Shovel.

By contract accepted and executed by the Government on December 7th, 1935, but which, together with "purchase order" thereon, was not delivered to plaintiff until December 12th, 1935, plaintiff rented to the Government, for use on a WPA road project at Kellogg, Wayne County, West Virginia, in the Fifth District of Works Progress Administration, a 5/8 c. y. gasoline shovel, with caterpillar traction (crawler type), for a period of three months, at a rental of \$400.00 per month; plaintiff agreeing, for this rental, to furnish and pay an operator therefor and keep the shovel in good repair, and WPA agreeing to furnish gas, oil and grease. A photostat copy of this contract is certified to this court

as one of the original exhibits with the Government's answer certified to the appellate court by the trial court as Exhibit 3-1, 3-2i, 3-2. The contract contains on its face this special and typewritten provision:

"Time lost on account of machine being unable to operate due to its mechanical condition, or absence of the operator, may be either deducted from this contract or equipment held enough additional time to make up for the time lost."

Acting upon the information, "(400 hours)", in the invitation for bids that the shovel required was to be operated approximately 130 hours per month, an average of about five hours per working day, and the prevailing wages, at the time, of an operator of a shovel of this capacity being \$1.00 per hour, plaintiff, before making its bid, contracted with a thoroughly competent and skilful operator to run the shovel at a wage of \$125.00 per month, straight time; calculated the cost of the steel lines and minor repairs likely to be required in its operation and upkeep for 400 hours use, the workmen's compensation premiums to be paid for the protection of its shovel operator, the cost of loading and hauling the shovel to Kellogg, a distance of fifty miles, and return, and all other anticipatable factors in the cost of performing the contract, and upon such estimate based its bid of \$400.00 per month for the three months contract. Following the award of the contract plaintiff made such replacement of new parts for old, and such repairs, as were necessary to put the shovel in good working condition, and on January 4th, 1936, weather conditions up to that time having made it impossible to do so earlier, loaded the shovel on trailer at the Charleston, West Virginia, airport, where it had

been in use, and delivered it at Snead's siding, at Kellogg, in accordance with the contract, and in charge of the skilled operator mentioned. On January 6th, 1936, plaintiff was advised at the office of the Procurement Division of the Treasury Department, at Charleston, by Mr. J. R. Downey, chief of the purchase division of that office, that the shovel had been rejected at the project by a telephone communication to that office from the Huntington office of WPA; but the grounds for such rejection were not then indicated to the plaintiff or to the Procurement Division. Plaintiff kept a shovel runner in charge of the shovel, on the project, from January 4th to January 11th, and insisted upon a formal rejection of it, in writing, stating the grounds of such rejection. No such rejection was received until January 25th, when there was mailed to plaintiff a notice of cancellation, giving the reason therefor as follows:

"Cancelled by requisitioner because this is an excavator (rear caterpillar type). Swings less than 180°, and not the shovel of the usual type".

(See Original Exhibit 3-3, Photostat, attached to contract, with Government's Answer, as certified to appellate court.)

Paragraph 9 of Form S. P. O. No. 7 provides:

"If any item of equipment so delivered does not comply with the requirements of the invitation for bids * * * it may be rejected."

While not material to the contract, the shovel actually had a three-fourths (270°) swing. It fully complied with the requisition therefor, and the requirements of the invitation for bids, and plaintiff was ready, willing, and financially able, and offered to fully perform and

complete its contract for the use and operation of the shovel, with operator, for the full period of three months. At the time of its verbal rejection, on January 6th, 1936, plaintiff was informed at the office of the Procurement Division that the true and actual reason for its rejection, and the cancellation of plaintiff's contract, was that the road project on which it was delivered actually contained approximately 44,000 cubic yards of excavation, which it was planned to remove in 400 hours, or at the rate of 110 cubic yards per hour—almost two cubic yards per minute—, and that through some error or blunder of the requisitioner a shovel of an average capacity of only about 30 yards per hour was requisitioned; and that at the same time plaintiff's shovel was rejected a shovel of 1½ cubic yards capacity was requisitioned for use on the project in removing this large quantity of excavation; and the record shows that this large shovel was thereafter used for this purpose. (See Appendix to Brief, Downey Letter, R. 12.) A detailed statement of the facts as to this contract may be found in Petition to WPA, set out in full in plaintiff's complaint, filed in the trial court, under Claim No. 2, beginning on page 7 of complaint, and found in the transcript of the record sent to this court at page Plaintiff made formal claim, by this sworn petition, against the Procurement Division for the damages it sustained through the breach of the contract by the Government, taking as its measure of damages the profit it could have made if permitted to perform it, represented by the difference between the aggregate rental payment of \$1,200.00 and the cost of full performance; which difference amounted to \$549.03. (See Complaint, page 10; Transcript of Record, unprinted Record, p.) The Procurement Division, which executed the contract, speaking through Mr. Downey, reporting plaintiff's claim under the contract

to the General Accounting Office, said:

"At the time this equipment was rejected a shovel of 1½ cubic yard capacity was requisitioned and later used for completion of the work on this project. Your attention is called to the reason given for the rejection of the claimant's equipment in that *the rejection was not based on the fact that the equipment did not meet the specifications of the contract.* The claimant has detailed a statement arriving at a claim of \$549.03 due as a result of rejection of this equipment for *reasons other than the equipment did not meet with the specifications of the contract.*

"Your attention is again invited to the letter of the Deputy Administrator dated January 25, 1937, which recommends payment of \$400.00 on this claim. Encumbrance of \$549.03 has been provided on this project * * * .

"This claim is not for actual services but for liquidated damages by reason of violation of contract * * * .

"* * * There is no question in the mind of the Procurement Officer but that *the contractor was damaged financially by reason of the Government failing to complete * * * the contract* * * * ."

Downey's Letter, App. to B., R. 12, 14.

The acting accountant-in-charge of the General Accounting Office, stating plaintiff's claim for damages under this contract, said, after quoting the rejection of the shovel by the district director of WPA:

"It is noted that *the rejection does not state that the equipment failed to comply with the specifications of the contract.*"

(See Auchmoody Statement, App. to B., R. 18.)

The General Accounting Office, rejecting plaintiff's claim under the contract, said:

"Even though it be admitted, as alleged, that the equipment was rejected in error, your claim being one for anticipated profits, and in the nature of damages for breach of contract by the Government, is not for payment inasmuch as no appropriation is available therefor."

(See Settlement Certificate, App. to B., R. 22.)

Contract No. 3—Concrete Mixer.

By contract executed by the Government April 27th, 1936, plaintiff rented to it, for use on a WPA street project in Charleston, West Virginia, a 5 cu. ft. concrete mixer, for a period of one month, at \$84.00 for the month. The contract bore on the face of it this special and typewritten provision:

"Time lost on account of equipment being unable to operate due to its mechanical condition may be either charged against this contract, or equipment held enough time to make up for time lost."

Plaintiff made delivery of the mixer, by truck, on the street project, not over a mile from the office of WPA at Charleston requisitioning it, on April 28th, when the truck driver found that the project had already been completed. He took the mixer to St. Albans, West Virginia, his place of business, and returned it next day, April 29th, to Charleston, and again offered delivery; but plaintiff was then informed by the WPA warehouse keeper there that the mixer, evidently requisitioned in error, would not be received, and it directed the truck driver to return the mixer to its plant site at St. Albans.

Plaintiff paid for the hauling of the mixer from West Hamlin, West Virginia, where it was loaded, to the Charleston project, \$9.18. Almost a year later, under date of March 30th, 1937, came the request for the cancellation of the contract, signed by one Davidson, assistant district engineer, and made to the Procurement Division office at Charleston, stating that

"* * * Equipment was requisitioned in error after completion of project; a balance of \$9.18 is being left on this purchase order as claim of such amount was made by vendor to cover cost of moving".

(See Downey Letter, App. B., R. 13.)

Mr. J. R. Downey, in his report to the General Accounting office upon the contract, stated:

"Contract * * * was entered into April 25th, 1936, with the claimant for one concrete mixer for the rental period of one month * * * at \$84.00 per month. The equipment was delivered to the project on April 28, 1936, but was not accepted due to the fact that the project had been completed * * *.

"Encumbrance for the amount of \$9.18 has been provided on this project * * *.

"The Deputy Administrator's letter dated January 25, 1937, is again referred to which recommends payment of the amount of \$9.18.

(See Downey Letter, App. B., R. 12, 13.)

The acting accountant-in-charge of the General Accounting Office says:

"Contract * * * entered into by G. T. Fogle and Company with the State Procurement Officer * * * provided for furnishing one * * * Con-

crete Mixer for a period of one month, or 168 hours, for the sum of \$84.00.

"Claimant avers that upon delivery of the equipment to the project, the project was found to be completed and there was no need for the equipment. Claimant also states that he was informed by officials of Works Progress Administration that delivery would not be accepted. Claimant asserts his claim in this instance for \$9.18 as being the cost of delivering the equipment to the project."

(See Auchmoody Statement, App. B., R. 18, 19.)

The General Accounting Office, rejecting plaintiff's claim of \$9.18 as made to the Procurement Division, said:

"It is alleged the payment of \$9.18 was incurred as the cost of delivery, for which amount claim is made. Said claim being obviously one for damages is likewise not for payment, there being no appropriation available therefor."

(See Settlement Certificate, App. B., R. 22, 23.)

Following the rejection by the General Accounting Office of all three of plaintiff's claims under the contracts, on the ground that such claims were not for compensation under the contracts, but for damages on account of the alleged breach thereof, and under Section 3678, R. S., the appropriation to Works Progress Administration involved did not provide, expressly or by implication, for the payment of damages therefrom, and consequently no appropriation was available for their payment, plaintiff instituted its action against the United States, under the Tucker Act, for the recovery of its damages upon the three contracts, stated separately, in

the District Court of the United States for the Southern District of West Virginia, at Charleston. The Government filed its answer, setting up as its defense upon all three contracts that none of the equipment was actually used by the Government, it had received no benefit therefrom, and was relieved from liability to plaintiff thereon by Paragraph 5 of Form S. P. O. No. 7 (App. B., R. 8), as follows:

"All bidders must agree to the rental specified in the invitation for bids, but the rate agreed upon shall apply to actual operating time only. Payment will be made only for such actual operating time, as determined by the proper administrative officer." (Underscoring supplied.)"

(See Government's Answer, unprinted transcript of Record, p.)

As to Contract No. 2, the shovel contract, the answer made the additional defense that the shovel delivered by plaintiff was rejected as not complying with the contract specifications, and plaintiff's contract was cancelled for that reason. But the facts to the contrary as to this defense are stated above, and the Government's brief on appeal conceded that the facts of the entire case were undisputed.

OPINIONS.

Upon submission of the case, on oral argument only, the District Court sustained the Government's defense, adopting in its written opinion, almost verbatim, the wording of defendant's answer. The pertinent portion of the opinion is as follows:

"It was admitted by the plaintiff that none of the equipment furnished under the contracts as

to Claims 1, 2 and 3 was ever actually used by the defendant, and defendant asserts that the amounts sought to be recovered under such claims did not represent the value of any service, actually performed, for which benefits accrued to the defendant.

"Form S. P. O. No. 7, entitled "Standard Conditions of Equipment Rental", was attached to and made a part of each of those contracts. It provides, in paragraph five thereof, as follows:

'All bidders must agree to the rental period specified in the invitation for bids, but the rate agreed upon shall apply to actual operating time only. Payment will be made only for such actual operating time, as determined by the proper administrative officer.'

"Upon this clause in the contracts the accounting officers of the defendant refused payment of Claims 1, 2 and 3, and denied that there was any liability on the part of the defendant for the amounts claimed by the plaintiff as coming, in any way, under the contracts.

"Under the terms of the contract, and under the law, as I see it, I am compelled to hold that there is no liability upon the defendant upon these claims."

(See App. B., R. 5, 6.)

Following the announcement of the trial court's opinion, plaintiff's counsel requested the district judge, the late George W. McClintic, to reconsider his judgment and permit the filing of a brief in plaintiff's behalf upon such reconsideration. This request was granted, and the brief commencing at page 10 of plaintiff's brief in the appellate court was submitted to him. (See Brief, pages 10 to 39.) Judge McClintic adhered to his origi-

nal opinion, and on July 18th, 1942, during his last illness, the judgment of the District Court against the plaintiff, for the reasons stated in the opinion, was entered by Judge Ben Moore, his successor. From this judgment plaintiff prosecuted an appeal to the Circuit Court of Appeals for the Fourth Circuit, and upon this appeal, on April 20th, 1943, the judgment of the District Court was affirmed, the opinion being rendered by Judge Armistead M. Dobie. The appellate court held:

"Paragraph 5 of S. P. O. No. 7, which was incorporated into and made a part of each of the three contracts * * * (provides that):

'5. All bidders must agree to the rental period specified in the invitation for bids, *but the rate agreed upon shall apply to actual operating time only. Payment will be made only for such actual operating time*, as determined by the proper administrative officer' (Italics ours.)"

"Under the above provision, * * * pursuant to the contracts, Fogle was to make the equipment *available for use* subject to the condition that the payment of rental fees would be made at the rate agreed upon in the contracts *only* for the actual operating time, *if and when* the equipment is used.

"* * * The contracts gave the Government the *right* to use the equipment and to pay for it at the specified contract rate *when and to the extent* used. There was imposed on the Government no *duty* to use the equipment * * *."

(All italics within quotation the court's.)

(See Printed Opinion, R. 34, 35; Advance Sheets 135 Fed. (2d), 119, 120, June 14th, 1943.

Plaintiff filed its petition for a rehearing of the case, with a supporting brief, on June 8th, 1943; and rehearing was denied June 16th, 1943.

QUESTIONS PRESENTED.

1. Whether the Government, when through its duly authorized agents and officers it enters into a contract with a citizen in a matter pertaining to the public service, and in the mode provided by law, as to such contract relinquishes its sovereign character, and subjects itself to the same rules of right and justice which all just governments administer between man and man; and if so

(a) Whether such a contract is to be interpreted by the federal courts the same as between private individuals, to the end that the intent of both parties thereto, and the object to be attained by both under the contract, may be ascertained and given effect;

(b) Whether a promise by the Government to do whatever is essential on its part to effectuate the manifest intent and purpose of the contract is necessarily implied, and as much a part of the contract as if plainly expressed therein;

(c) Whether the contract, prepared entirely by and couched in the language of the Government's own officers, is to be construed most strongly against the Government; and

(d) Whether the courts should follow and give great weight to the construction placed upon the contract by the Government's own officers, executing it and charged with its performance on the part of the Government.

(e) Whether, in the instant case, the appellate court, in construing the obligation of the Government under its contract No. 1, for the rental of a concrete mixer for 100 hours, at the rental rate of seventy-five cents per hour, wholly ignored, first, the primary principle of such construction that a contract must be read as a whole, and effect given to each and every provision thereof, in order to arrive at the true intention of the parties; second, all of the written provisions of the contract, and third, all of the eight other paragraphs of its printed conditions, bearing upon its construction; and by a dialectical construction of a part of one isolated paragraph of these printed conditions alone, determined the contract to be not a rental of the mixer by the Government for 100 use hours, but an option on its part, after delivery of the mixer to the Government, to use it only if and when it chose to do so, and to pay for it, at the agreed rate, only if and when so used; and whether such a construction of the contract, if so reached, should be reviewed by this court.

(f) Whether the appellate court, in construing a contract between the Government and a private contractor, is bound by the numerous decisions of this court, the federal appellate and trial courts, and the state courts of last resort, in an unbroken line of authority, that if there is a repugnancy between the printed and written provisions of the contract, the writing is presumed to express the specific intention and agreement of the parties, and will prevail.

2. Whether or not the appellate court, given the three contracts in suit, all prepared by and in the language of the Government, and on the faith of which plaintiff incurred obligations and parted with its prop-

erty, and each of which was susceptible of two constructions, one of which, giving to all the provisions of the contract their natural, obvious meaning, made it fair, customary, rational and probable, and such as prudent men would naturally execute; while the other, by giving to a single provision of the entire contract a curious, hidden sense and meaning, made it unusual, irrational, improbable, harsh and unjust, and such a contract as no prudent contractor would make with the Government or any one else, gave to all three contracts the latter construction, thus working a grave injustice to the plaintiff.

3. Whether or not, under contract No. 1, in suit, for the rental to the Government of a concrete mixer for 100 hours at seventy-five cents per hour, upon the uncontradicted facts, and as a matter of law, there was a taking by the Government of the private property of plaintiff for public use without just compensation, in contravention of the Fifth Amendment to the Constitution.

4. Whether the appellate court, by its final judgment herein, has denied to plaintiff its remedy against the Government, given by the plain intendment of both letter and spirit of the Tucker Act, while at the same time exempting the Government from the scrupulous performance of its obligations to the plaintiff, as recognized and admitted by its duly authorized agents and officers entering into and charged with the performance of such obligations on its behalf; thus bringing the Government, against its will, into contempt, prejudicing it in its dealings in the common fields of human intercourse, and arousing the indignation of honorable men. *Hiel v. U. S.*, 273 Fed. 729.

SUBORDINATE QUESTIONS PRESENTED.

There are two other questions presented by the judgment of which review is sought, neither of them of major importance or necessary to the decision of the case, but the ruling of the appellate court whereon will be assigned as error prejudicial to plaintiff in the event its petition is granted. These questions are:

1. Whether or not the three contracts in suit, for the rental of heavy road and street construction equipment, are, as held by the appellate court, "nothing more than minor varieties of the familiar 'requirements' contracts", as illustrated by *Brawley v. U. S.*, 96 U. S. 168, In re *United Cigar Stores of America*, 72 Fed. (2nd) 673, and other cases cited in the opinion (Printed Op., R. 35.)

2. Whether, there being, under the undisputed evidence, no mutual mistake of fact by the contracting parties in entering into Contract No. 2, for the rental of the shovel, and Contract No. 3, for the rental of the second mixer, the appellate court could find such mutual mistake regardless of the evidence, and therefrom adjudicate the hypothesis that if plaintiff had sued to recover its expenses incurred in performing its part of the contracts, the trial court, under the Tucker Act, would have been without jurisdiction of such hypothetical action.

REASONS FOR GRANTING THE WRIT.

1. Application to this court for review of the instant judgment is predicated upon the principle, laid down by numerous federal appellate and trial courts in suits both by and against the Government, and stating as

much a rule of Government polity as a principle of law, that when the Government contracts with a private citizen in a matter pertaining to the public service it relinquishes its sovereign character and immunity, and subjects itself to the same rules which the law applies to contracts between private individuals; and that its contract is to be interpreted the same as one between individuals, so as to ascertain the intent of the parties, and give effect to that intent accordingly. This is the holding in *U. S. v. North American Commercial Co.*, 74 Fed. 145, *U. S. v. A. Bently & Sons Co.*, 293 Fed. 229, and *Hiel v. U. S.*, 273 Fed. 729, a suit under the Tucker Act, in the first case applied against, and in the second in favor of the Government, and in the *Hiel Case* invoked against the United States. It was upon the faith of this principle that this suit was instituted and has been prosecuted to its present stage; and because the appellate court, without questioning, but by implication conceding, the general law, wholly ignored the corollary rules thereunder for ascertaining the intent and purpose of the parties to the contract as uniformly determined by this court, the federal appellate and trial courts, and state courts of last resort, in an unbroken consensus of authority, in deciding the several questions of general law arising upon the construction of the three contracts in suit, its decision therein is not only untenable under the facts, but as much in conflict with the weight of authority on these questions as if there had been an express refusal to follow this authority. For example, it was urged by the plaintiff in both the trial and appellate courts, as to contract No. 1, for the rental of its mixer for 100 hours, (1) that the rental contract must be read as a whole, and each provision thereof given effect, to reach the intention of the parties thereto; and that when so read, there was a necessarily im-

plied promise upon the part of the Government to operate the mixer for a total of 100 use hours, and to pay for its use for that period, which implied promise was as much a part of the contract as if expressed therein; (2) that the contract, being prepared by and in the language of the Government's own officers, should be most strongly construed against the Government; and (3) that the court should accord great weight to the construction in plaintiff's favor given to the contract by the Government's own officers executing it and charged with its performance. In support of the first proposition were cited *Dupont, etc., Powder Co. v. Schlottman*, 218 Fed. 353; *Diamond Alkali Co. v. P. C. Tomson Co.*, 35 Fed. (2nd) 117; *Great Lakes, etc., Trans. Co. v. Scranton Coal Co.*, 239 Fed. 603; *U. S. v. A. Bently & Sons Co.*, 293 Fed. 229; *Wildman Mfg. Co. v. Adams Top Cutting Mach. Co.*, 149 Fed. 201; *U. S. v. Purcell Envelope Co.*, 249 U. S. 313, 63 L. Ed. 620; *Sacramento Navigation Co. v. Salz*, 273 U. S. 325, 71 L. ed. 663; *Southern Ry. Co. v. Franklin, etc., Railroad Co.*, 96 Va. 693; 6 R. C. L. §244, p. 856, 857; *Corpus Juris*, §521, p. 558, *Corpus Juris Secundum*, §328, p. 778, 779; and *Williston on Contracts*, Revised Ed., §1293, p. 3683; in support of the second, *Garrison v. U. S.*, 7 Wall. (U. S.) 688; *Noonan v. Bradley*, 76 U. S. 394; *U. S. v. A. Bently & Sons Co.*, 293 Fed. 229, and *Williston on Contracts*, Revised Ed., §621, p. 1788, 1789; and in support of the third, *Pressed Steel Car Co. v. Eastern Ry. Co. of Minn.*, 121 Fed. 609; *Garrison v. U. S.*, 7 Wall. (U. S.) 688; and *Williston on Contracts*, Revised Ed. §623, p. 1792. All these authorities were cited, and the matter of each deemed pertinent quoted, in the original brief or the brief in support of plaintiff's petition for rehearing filed in the appellate court. That court, after disavowing any quarrel with plaintiff's statement of the general law that

the contract must be read as a whole, with effect given to each provision thereof in order to arrive at the true intention of the parties (opinion, 135 Fed. (2nd) 117, p. 119), read only a part of one printed paragraph of the contract, ignored all its other provisions, ignored both the fact that the contract was prepared by the Government and the fact that it had been construed by the Government's officers executing it as binding the Government to use the mixer, thus conveniently ignoring the operation of these facts in plaintiff's favor, and found from this one isolated provision that there was no implied promise by the government to use the mixer, but a mere acquisition of an option to use it.

In Contract No. 2, for the rental of a shovel, with its operator, for three months at four hundred dollars per month, no question of implied promise was involved, the promise of the Government to pay the rental being express, absolute, and not conditioned upon the use or operation of the equipment. The only abatement of or reduction from the monthly rental the Government could make was under the typewritten provision of the contract that time lost on account of the shovel being unable to operate due to its mechanical condition or the absence of the operator might be either deducted from the rental, or the shovel held on the work beyond the current monthly period in which the time was lost, and operated without payment, long enough to make up the lost time. This written provision controlled the printed condition of Paragraph 5, Form S. P. O. No. 7, that payment would be made only for the actual operating time of equipment. Contract No. 3, for the rental of the second mixer for one month, at \$84.00 for the month, contained the same typewritten provision found in the shovel contract for the abatement of the monthly

rental, except that it applied only to time lost on account of the equipment being inoperable due to its mechanical condition (WPA furnishing the operator). Plaintiff sued for the profit it could have made upon the shovel contract if permitted to fully perform it, and the trivial cost of delivery of the second mixer upon the Government work, relying as to both contracts upon the rule, settled by this court for the past fifty years, that in case of a repugnancy between the printed and written provisions of a contract the writing will prevail, and cited its decisions in *Sturm v. Baker*, 150 U. S. 312 (1893), *Hagan v. Scottish Ins. Co.*, 186 U. S. 423 (1902), and *Thomas v. Taggart*, 209 U. S. 385 (1907), and *Deutschle v. Wilson*, 39 Fed. (2nd) 406; *The Addison Bullard* (C. C. A.), 258 Fed. 180; *Pierpont v. Pierpont*, 71 W. Va. 431, 76 S. E. 844, 849, 43 L. R. A. (N. S.) 783; Williston on Contracts, Revised Ed., §622, p. 1791; and 13 Corpus Juris, §498, and cases cited. The appellate court, again completely ignoring the existence, in both contracts, of this written provision, and its effect upon their construction, held them to be governed by the printed condition quoted, and, like contract No. 1, mere options to the Government to use the equipment or not, at its pleasure, under which plaintiff assumed the risk of furnishing, at its own expense for replacements, repair and delivery, equipment which might never be used, and no rental therefor ever paid, by the Government.

The appellate court, called upon to give judicial construction to these three contracts between plaintiff and the Government, was bound to follow those rules of interpretation prescribed by the decisions of this court, other federal courts, and state courts of last resort, for attaining the ultimate of all construction, the intention

of the parties at the time the contract was entered into. The facts of the case were undisputed, and all of the evidence was documentary; thus the interpretation of the contracts became purely a question of law, that is, a matter of applying to each contract the rule or rules of construction dictated by its provisions. One of those rules was that if the court found the contract susceptible of two constructions, one of which, by giving to its provisions their natural, obvious meaning, made it fair, customary, rational, and such as prudent men would naturally execute, while the other, by giving to those provisions a hidden, curious sense and meaning, made it an unfair, unusual and improbable agreement, such as prudent men would not be likely to enter into, the interpretation which made the contract fair, rational and probable must be preferred. Plaintiff cited to the appellate court, as declaratory of this rule, the decisions of this court in *Noonan v. Bradley*, 76 U. S. 394, and *Garrison v. U. S.*, 7 Wall. (U. S.) 688, the circuit court of appeals decisions in *Pressed Steel Car Co. v. Eastern Ry. Co. of Minn.*, 121 Fed. 609, *Hawkeye, etc., Assn. v. Christy*, 294 Fed. 208, and *Delaware Ins. Co. v. Greer*, 120 Fed. 916, 921, and the circuit court decision in *Coghlan v. Stetson*, 19 Fed. 727. Regardless of this array of authority in its support, the appellate court again contravened a settled rule for the judicial construction of contracts, by giving to all three an interpretation making them so unreasonable, improbable and unfair that no prudent man would enter into them, and so harsh and unjust to the plaintiff that the court itself felt constrained to admit the harshness, "at first blush", of its interpretation of them.

It will be seen from the foregoing statement that the appellate court, in its construction of the contracts in

suit, has failed to apply thereto at least four of the rules for the construction of contracts prescribed by the weight of authority and invoked by the plaintiff as applicable upon the existent facts, circumstances and situation of each. It has not denied the existence of these rules, nor the weight of authority by which they are buttressed, and thus has not affirmatively decided any question of the general law of judicial construction of contracts contrary to this weight of authority; but by the simple expedient of ignoring the existence of the provisions, facts and circumstances of each of the contracts requiring the application of the pertinent rule or rules of construction, it has by indirection as effectually decided the question of the Government's liability under the contracts contrary to the weight of authority as if that authority were directly challenged. As the rights of the parties to every contract presented for judicial decision must be determined from the intention of the parties, and this intention must be reached by the application of the judicially established rules for its determination arising under the contract, it is of prime importance in every case that these rules be followed; and if, in a given case, and where applicable, they are ignored and not applied, with the result that the true intention of the contracting parties is not reached, the court has indirectly decided the rights of the parties contrary to such established and authoritative rules. If it is important to the administration of justice that these rules be observed by the courts, it is submitted that their non-observance in this case amounts to the decision of an important question of general law and non-jurisdictional federal law in a way both untenable and in conflict with the weight of authority and the applicable decisions of this court, and is such an action or decision of the appellate court as should be reviewed.

2. Under Contract No. 1, in suit, plaintiff, by written contract, rented a concrete mixer to the Government for 100 hours at seventy-five cents per hour, a total rental of \$75.00. The mixer was delivered to the Government work, at plaintiff's expense, on September 23rd, 1935, and accepted by the foreman on the work, and receipted for, as in good mechanical condition. To the knowledge of the Government employes in charge of the construction work, the mixer was never needed on the project, having been requisitioned for it in error. It was held on the project, and not used, from September 23rd, 1935, to January 29th, 1936, over four months, and by letter of the latter date plaintiff was notified that it had not been used "on account of adverse weather conditions", and would not be needed for about sixty days, and might be removed from the work, and that the Government would pay plaintiff the cost of removing it. The statement that the mixer had not been used on account of bad weather was knowingly false, and admittedly made to cover up the original blunder in requisitioning it and the subsequent holding of it on the work without notice to the owner that it was not being or to be used and might be repossessed. Mixers of this type and capacity were being rented by the Government for \$75.00 per month, and were in great demand, during this four months period. Plaintiff sued the Government for damages for its breach of this contract, and made the measure of its damages \$300.00, the fair rental value of the mixer at \$75.00 per month for the four months it was held by the Government. The appellate court construed plaintiff's rental contract to be an option to the Government to use the mixer or not, as it saw fit, and to pay seventy-five cents an hour for each hour it was used, and nothing if it was never used; and held that as the Government was not bound to use it there

was no breach of its contract; that as it had not used the mixer the Government had received no benefit under the contract, and that accordingly it owed plaintiff nothing thereunder. Upon the undisputed facts, even if the written contract could be construed as an option, under which the Government, in good faith, took possession of the mixer, with the right to use and the expectation of using it, the taking of it with knowledge on the part of the requisitioning agents of the Government that it never would be used by the Government, and the withholding from the owner of this knowledge and the possession of the equipment for more than four months, was not a taking of the equipment under the written contract, but a tortious taking of it, for which the owner was entitled, under the Constitution, to just compensation, measured by the rental value of it to the owner for the four months it was held by the Government, and not by its value to the Government; the detriment to the owner, not the benefit to the Government, being the basis of the implied promise of the Government to make just compensation for the tortious act of its agents, as upon a fictional contract implied in fact, and in order to avoid an admission of the tort. This taking of plaintiff's private property by the Government, without just compensation, in contravention of the Fifth Amendment to the Constitution, was called to the attention of the appellate court, which by its refusal of a rehearing of its decision by implication, at least, refused to hold that there was such a taking, with the consequent right to compensation. This decision, it is submitted, is untenable upon the facts, contrary to the decisions of this and other federal courts constituting the weight of authority upon the question, and involves the construction of the Fifth Amendment, and for all these reasons should be reviewed by this court.

3. The plain intendment of the Tucker Act, in both letter and spirit, was to give to persons having claims against the Government for comparatively small amounts the right to bring suits in the courts of the United States in districts where they and their witnesses resided, without subjecting them to the expense and annoyance of litigating in the Court of Claims at Washington. Plaintiff, availing itself of the right given and the remedy provided by the act, sued the Government in the federal district court of its residence for damages for the breach of three contracts for the rental of construction equipment, the aggregate of its damage claimed under all three being less than nine hundred dollars. The officers of the Government who executed these contracts, and its executive administrative agents charged with performance of the Government's obligations under them, all construed the contracts as contracts of rental, recognized its obligation under them to use the rented equipment, admitted the breach of this obligation and the damage to plaintiff caused by such breach, and were ready to pay and offered to pay these damages, and would have paid them but for the ruling of the General Accounting Office of the Treasury Department that damages for the breach of contracts made in behalf of the Works Progress Administration could not be lawfully paid out of the appropriation made to that government agency. The appellate court held that the contracts were not rental contracts, but were options given to the Government to use the equipment; that the Government was not bound to use it, had not agreed to pay rental for it, and had not breached any of the contracts; and that to give the contracts the construction given them by both the plaintiff and the contracting and executive officers representing the Government in the premises would be "a legal solecism, in that it

would force the Government to pay for the use of something it had not enjoyed, and for which it had not agreed to pay." The appellate court's construction of the contracts is wholly untenable. While it purports to relieve the Government from paying for something for which it did not agree to pay, it actually puts the Government, against its will as expressed by its duly authorized representatives, in the equivocal position of refusing to pay its just obligations in an amount the very smallness of which makes this refusal the more embarrassing. In seeking to exempt the Government from the performance of an obligation it had every will and desire to perform, the appellate court has done the Government a distinct disservice, in that the result of the decision is to bring the United States into contempt, and to prejudice it in its future contract relations with its citizens. Congress, by the passage of the Tucker Act, meant to avoid just such consequences as these. It is not of great importance, even to the plaintiff, that it has been denied its remedy under the act other than the bare remedy of suit; but it is important that a decision holding such potentials of injury to the Government's own interests should be reviewed by this court, in the exercise of its power of supervision of the lower courts, and the question of whether the Government's contracts are to be interpreted the same as those between individuals settled by the highest judicial authority.

The petition for a rehearing of the judgment of the appellate court is a part of the record accompanying this application. The brief in support of this petition, and printed with it, while not a part of the record, is asked to be treated and considered by this court as an exhibit, and as such, of possible aid to it in showing the contentions of plaintiff made in the appellate court.

For the foregoing reasons it is respectfully submitted that this petition should be granted.

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pany, Petitioner.

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